A

Mrs Suporn Vachimapet lwn Pendakwa Raya

B MAHKAMAH TINGGI (ALOR SETAR) — PJK 45A-11–04 TAHUN 2015
HASHIM HAMZAH H
30 OKTOBER 2016

C *Undang-Undang Jenayah — Dadah berbahaya — Pengedaran — Akta Dadah Berbahaya 1952, s 39B(1)(a) — 1723.40g methamphetamine — Dadah berbahaya dijumpai tersembunyi dalam beg tertuduh — Tertuduh gelisah enggan membuka begnya bila diminta oleh polis — Perbezaan dalam tandaan ekshibit dadah yang dirampas — Sama ada terdapat pemutusan rantaian keterangan mengenai ekshibit — Sama ada percanggahan dalam laporan polis dan laporan*
D *kimia mengenai berat dadah — Sama ada kes prima facie dibuktikan — Sama ada tertuduh diupah oleh orang lain untuk membawa beg tersebut — Sama ada pemilikan dibuktikan — Sama ada jagaan atau kawalan dibuktikan — Sama ada kelakuan tertuduh menunjukkan pengetahuan — Sama ada anggapan statutori di bawah s 37(da) Akta Dadah Berbahaya 1952 berbangkit — Sama*
E *ada tertuduh gagal menangkis anggapan*

Tertuduh telah dituduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB 1952') dengan kesalahan mengedar dadah berbahaya iaitu methamphetamine sejumlah berat 1723.40g. SM Munir bin Musa ('SP5')
F telah memberi keterangan bahawa berdasarkan maklumat yang diterima, beliau dan pasukan beliau telah memberkas tertuduh di Stesen Bas Changloon. Sebuah beg pakaian beroda berkunci (eksh P2) telah ditemui berhampiran tertuduh. Apabila SP5 dan pasukannya menghampiri tertuduh dan memperkenalkan diri mereka sebagai polis serta meminta tertuduh membuka
G P2, tertuduh dalam keadaan gelisah enggan membuka P2 dan menyatakan bahawa 'cloth only, cloth only'. Setelah diarah beberapa kali akhirnya tertuduh telah mengeluarkan anak kunci dari poket kanan hadapan seluarnya dan telah membuka mangga yang mengunci P2. SP5 mendapati di dalam P2 terdapat peralatan komputer iaitu 'AC Adapter' dalam kuantiti yang banyak. Dadah
H berbahaya tersebut telah kemudiannya dijumpai tersembunyi di dalam semua 'AC Adapter' tersebut. Tertuduh di dalam pembelaannya telah menyatakan bahawa ia bekerja sebagai tukang urut dan pelacur di sebuah kelab malam di Bangkok. Menurut tertuduh seorang kawan sekerjanya yang bernama Pho telah menghubungi tertuduh melalui telefon dan memaklumkan bahawa ada
I seorang pelanggan ingin melanggan tertuduh dan Pho juga ingin mengirim sebuah beg kepada pelanggan tersebut. Tertuduh telah ke kondominium di mana Pho dan teman lelaki Pho tinggal untuk mengambil beg yang ingin dikirimkan tersebut. Di sana tertuduh tidak berjumpa dengan Pho tetapi telah berjumpa dengan teman lelaki Pho yang dikatakan oleh tertuduh sebagai

seorang lelaki negro. Apabila tertuduh mendapati beg tersebut adalah besar dan berat, tertuduh telah meminta upah sebanyak Baht1,300 untuk membawa beg tersebut. Menurut tertuduh, semasa menerima beg tersebut ia ada melihat kandungannya dan mendapati ia berisi kabel internet, *headphone* dan *webcam*. Tertuduh menyatakan bahawa tertuduh telah bertolak dari Bangkok dan apabila sampai di Danok, tertuduh telah membeli sebuah beg baru kerana beg asal susah dibawa. Tertuduh menyatakan bahawa semua kandungan beg asal beserta beg asal itu sendiri telah dimasukkan ke dalam beg yang baru dibeli. Tertuduh menafikan pengetahuan tentang dadah yang dijumpai di dalam *AC Adapter* tersebut dan menyatakan bahawa dia telah dianiayai oleh Pho. Peguambela tertuduh telah membangkitkan juga isu bahawa: (a) terdapatnya pemutusan rantaian keterangan mengenai ekshibit dadah yang dirampas, iaitu bahawa tandaan dalam borang serah menyerah barang kes tidak sama dengan tandaan yang digunakan di dalam laporan kimia; dan (b) terdapat percanggahan berkaitan berat dadah, iaitu bahawa, menurut laporan polis berat dadah yang dirampas adalah 2.420g manakala laporan kimia pula menyatakan berat dadah tersebut sebagai 2266.72g, iaitu perbezaan 200g.

Diputuskan, mendapati tertuduh salah dan menyabitkannya di bawah s 39B(1)(a) ADB 1952:

(1) Pihak pendakwaan perlu membuktikan bahawa tertuduh mempunyai pemilikan ke atas dadah tersebut. Pemilikan melibatkan elemen jagaan atau kawalan terhadap dadah berbahaya tersebut serta elemen pengetahuan. Pembuktian boleh dibuat melalui keterangan langsung atau melalui anggapan statutori yang terdapat di dalam ADB 1952. Pendakwaan juga perlu membuktikan sepertimana pertuduhan bahawa barang kes tersebut adalah methamphetamine seberat 1723.40g (lihat perenggan 9).

(2) Adalah jelas bahawa tertuduh mempunyai jagaan atau kawalan terhadap P2 yang mengandungi dadah berbahaya di mana tertuduh dipertuduhkan. Tertuduh telah mengelak daripada P2 dibuka untuk pemeriksaan. Tertuduh juga berada di dalam keadaan gelisah apabila diarahkan berbuat demikian. Daripada kelakuan tertuduh ini jelas menunjukkan bahawa tertuduh mempunyai pengetahuan tentang barang salah yang berada di dalam P2. SP5 mengesahkan bahawa tertuduh kelihatan gelisah semasa barang kes disyaki syabu dijumpai di dalam *AC Adapter*. Ini jelas menunjukkan bahawa tertuduh mempunyai pengetahuan tentang barang kes dadah tersebut (lihat perenggan 17).

(3) Tertuduh mempunyai pemilikan terhadap barang kes dadah yang dijumpai di dalam 23 *AC Adapter* jenama SONY yang di dapati di dalam P2 tersebut. Berdasarkan berat methamphetamine yang terlibat, ia membangkitkan anggapan statutori di bawah s 37(da) ADB 1952 bagi

membuktikan inti pati perbuatan mengedar dadah tersebut (lihat perenggan 19).

(4) Tidak terdapat pemutusan ke atas rantaian keterangan berkaitan barang kes. Daripada keterangan SP3 adalah jelas bahawa SP3 menimbang bahan kristal dan mendapati berat bersih adalah 2262.72g dengan menggunakan alat penimbang yang telah dikalibrasi. Pun begitu aspek penandaan barang kes dari rampasan hinggalah sampai kepada SP3 untuk dibuat ujian tiada pemutusan rangkaian keterangannya. Oleh itu hujah peguambela tertuduh tentang percanggahan berat juga tiada merit. Maka terdapat kes prima facie terhadap tertuduh di akhir kes pendakwaan dan tertuduh perlu membela diri (lihat perenggan 24).

(5) Semasa SP5 ingin membuat pemeriksaan kandungan beg P2 di Stesen Bas Changloon, tertuduh tidak memberikan kerjasama dan menyatakan bahawa kandungan P2 adalah 'cloth only, cloth only'. Walau bagaimanapun tertuduh di dalam pembelaannya sebenarnya mengetahui bahawa tiada apa-apa pakaian di dalam beg P2 tersebut. Ini menunjukkan bahawa tertuduh mengetahui dadah berbahaya berada di dalam beg P2 (lihat perenggan 31).

(6) Keterangan tertuduh sukar diterima dan hanyalah rekaan semata-mata serta penafian dan pemikiran terkemudian oleh tertuduh. Beban adalah kepada tertuduh untuk menyangkal anggapan di bawah s 37(da) ADB 1952 atas imbangan kebarangkalian. Tertuduh telah gagal untuk menangkis anggapan di bawah s 37(da) ADB 1952. Tertuduh tidak menimbulkan apa-apa keraguan yang munasabah terhadap keterangan di dalam kes pendakwaan (lihat perenggan 33 & 35).

[English summary

The accused was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA 1952') for the offence of trafficking dangerous drugs ie methamphetamine weighing 1723.40g. SM Munir bin Musa ('SP5') testified that based on the information received, he and his team had apprehend the accused at the Changloon Bas Station. A locked suitcase on wheels (exh P2) was found near the accused. When SP5 and his team approached the accused and introduced themselves as police and told the accused to open P2, the accused in an agitated state refused to open P2 and said 'cloth only, cloth only'. After being directed a few times finaaly the accused took out a key from his front right-hand pocket of his pants and opned the lock that locked P2. SP5 found in the P2 a computer equipment ie 'AC Adapter' in a large quantity. The dangerous drugs was later found hidden in all the 'AC Adapter'. The accused in his defence had stated that he was employed as a masseuse and prostitute in a night club in Bangkok. According to the accused, a collegue named Pho had communicated the accused by phone and informed that a client wanted the service of the accused and Pho also wanted to send a bag to the said client. The

accused went to the condominium where Pho and Pho's boyfriend lived to take the bag to be sent. There the accused did not met Pho but had met Pho's boyfriend alleged by the accused to be a negro man. When the accused found that the said bag was heavy and huge, the accused asked for a wage of Baht1,300 to bring the said bag. According to the accused, when receiving the said bag he had seen the contents and found it to contain an internet cable, headphone and webcam. The accused submitted that the accused had departed from Bangkok and when he arrived in Danok, the accused bought a new bag as the original bag was difficult to carry. The accused submitted that all the contents of the original bag and the said bag itself was included in the newly bought bag. The accused denied any knowledge of the drugs found in the AC Adapter and submitted that he had been victimised by Pho. The solicitor for the accused also raised the issue that: (a) there was a break in the chain of evidence of the seized drugs exhibit, ie that the mark in the surrender of case items form was not the same as the mark used in the chemist report; and (b) there was a discrepancy in relation to the weight of the drugs, ie that, according to the police report the weight of drugs seized was 2.420g while the chemist report also had submitted the weight of the drugs as 2266.72g, ie a difference of 200g.

Held, found the the accused guilty and convicted him under s 39B(1)(a) of the DDA 1952:

(1) Prosecution must prove that the accused had ownership on the said drugs. The ownership involved the element of custody and control upon the said dangerous drugs and the elemnt of knowledge. Proof can be made through direct evidence or through statutory assumptions contained in the DDA 1952. The prosecution also must prove as per charge that the case item was methamphetamine which weighed 1723.40g (see para 9).

(2) It is clear that the accused had custody or control of P2 which contained dangerous drugs which the accused was charged. The accused had eluded from P2 opening for inspection. The accused also was in a state of anxiety when instructed to do so. Based on the conduct of the accused it clearly showed that the accused had knowledge of the wrong item which was inside P2. SP5 confirmed that the accused looked nervous when the suspected case item was found in the AC Adapter. This clearly showed that the accused had knowledge of the said dangerous drugs (see para 17).

(3) The accused had ownership of the drugs case item found in 23 AC Adapter SONY brand found in P2. Based on th weight of methamphetamine involved, it raised a statutory assumption under s 37(da) of the DDA 1952 to prove the ingredients of the conduct of trafficking the said drugs (see para 19).

(4) There was no break in the chain of evidence n relation to the case item.

Based n the evidene of SP3 it is clear that SP3 had weighed the crystal substance and found that the nett weight was 2262.72g by using the calibrated weighing tools. Nevertheless the marking aspect of the case item was seized until it reached SP3 to be tested had no break in the chain of its evidece. Therefore the submission of the accused's solicitor on the weight discrepancy also had no merit. Thus there was a prima facie case against the accuse at the end of the prosecution case and the accused must put in his defence (see para 24).

(5) When SP5 wanted to examine the contents of P2's bag at the Changloon Bas Station, the accused did not cooperate and submitted that the contents of P2 was 'cloth only, cloth only'. However, the accused in his defence actually knew that there were no clothes in P2's bag. This showed that the accused knew that the dangerous drugs were in P2's bag (see para 31).

(6) The evidence of the accused was difficult to accept and was only a fiction and an afterthought denial by the accused. The burden was on the accused to rebut the assumption under s 37(da) of the DDA 1952 on the balande of probabilities. The accused failed to rebut the assumption under s 37(da) of the DDA 1952. The accused did not raise any reasonable doubt against the evidence in the prosecution's case (see para 33 & 35).]

Nota-nota

Untuk kes-kes mengenai pengedaran dadah berbahaya, lihat 4(1) *Mallal's Digest* (5th Ed, 2015) perenggan-perenggan 815–975.

Kes-kes yang dirujuk

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, MP (dirujuk)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, MR (dirujuk)
Khairiddin Sufi v PP [2012] 6 CLJ 457, MR (dirujuk)
Mat v PP [1963] 1 MLJ 263 (dirujuk)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (dirujuk)
Mr Mamasobri Useng v PP [2010] 6 MLJ 521; [2011] 6 CLJ 377, MR (dirujuk)
Nasruddin bin Daud v PP [2010] 3 MLJ 329; [2010] 2 CLJ 322, MR (dirujuk)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, MP (dirujuk)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (dirujuk)
PP v Mhd Dzahir bin Ahmad [2014] MLJU 1831; [2015] 4 CLJ 880, MR (dirujuk)
PP v Mohd Amin bin Mohd Razali & Ors [2002] 5 MLJ 406; [2002] 5 CLJ 281, MT (dirujuk)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, MP (diikut)
PP v Puvaneaswaran Kaniapan [2003] 4 CLJ 609, MT (dirujuk)
PP v Saimin & Ors [1971] 2 MLJ 16 (dirujuk)
PP v Suzie Adrina bte Ahmad [2006] 5 MLJ 135, MR (dirujuk)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, MP (dirujuk)
Wong Nam Loi v PP [1997] 3 MLJ 795; [1997] 4 AMR 3603, MR (dirujuk)
Wong Swee Chin v PP [1981] 1 MLJ 212, MP (dirujuk)

Undang-undang yang dirujuk

Akta Dadah Berbahaya 1952 ss 37(da), 39B(1)(a), (2), Jadual Pertama
Kanun Tatacara Jenayah s 180, 180(1), (2)

Ai Cha Ran a/l Din Chee Ron (Ai Cha Ran & Co) bagi pihak tertuduh.
Norshuhada Mohd Yatim (Timbalan Pendakwa Raya, Pejabat Penasihat Undang-Undang Negeri Kedah) bagi pihak pendakwaan.

Hashim Hamzah H:

PENDAHULUAN

[1] Mrs Suporn Vachimapet iaitu tertuduh di dalam kes ini telah didapati salah dan disabitkan di atas pertuduhan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan dihukum mati di bawah s 39B(2) Akta yang sama telah merayu ke Mahkamah Rayuan di atas sabitan dan hukuman tersebut.

PERTUDUHAN

[2] Pertuduhan ke atas tertuduh adalah seperti berikut:

> Bahawa kamu pada 3hb September, 2014 jam lebih kurang 3.20 petang, di Stesen Bas Changloon, dalam Daerah Kubang Pasu, dalam Negeri Kedah Darul Aman telah didapati mengedar dadah berbahaya iaitu *Methamphetamine sejumlah berat 1723.40 gram*. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

KES PENDAKWAAN

[3] Pihak pendakwaan telah memanggil tujuh orang saksi memberi keterangan. Berdasarkan keterangan saksi-saksi pendakwaan, kes pendakwaan adalah seperti berikut:

(a) pada 3 September 2014 jam lebih kurang 3 petang, SM Munir bin Musa ('SP5') yang pada masa itu bertugas sebagai Ketua Polis Balai (OCS), Balai Polis Changloon, telah menerima satu maklumat daripada orang

awam berkenaan seorang perempuan dalam keadaan mencurigakan di kawasan Stesen Bas Changloon. SP5 kemudiannya telah mengumpulkan enam orang anggotanya di Balai Polis Changloon dan kemudiannya memberi satu taklimat ringkas kepada mereka berkaitan maklumat yang SP5 perolehi;

(b) pada jam lebih kurang 3.20 petang, SP5 bersama enam orang anggotanya telah bergerak ke Stesen Bas Changloon. Di Stesen Bas Changloon, SP5 telah membahagikan pasukannya kepada dua kumpulan dan memberikan arahan untuk mereka membuat pemerhatian di sekitar kawasan Stesen Bas Changloon tersebut;

(c) semasa membuat pemerhatian di kawasan Stesen Bas Changloon tersebut, SP5 ternampak seorang perempuan (yang kemudiannya dicamkan sebagai 'tertuduh') sedang duduk di atas sebuah kerusi panjang yang berada di hadapan kaunter tiket 'Salmah Enterprise'. SP5 juga melihat terdapat sebuah beg pakaian beroda berwarna merah jambu dan hitam (yang kemudiannya telah dikemukakan di mahkamah dan ditandakan sebagai P2) berhampiran tempat di mana tertuduh sedang duduk;

(d) SP5 dan pasukannya telah menghampiri tertuduh. SP5 telah memperkenalkan dirinya sebagai polis dalam Bahasa Inggeris dan meminta tertuduh menunjukkan pasportnya. SP5 kemudiannya telah meminta tertuduh membuka P2 yang SP5 dapati dalam keadaan berkunci dengan mangga (*padlock*). Pada mulanya menurut SP5, tertuduh yang dalam keadaan gelisah enggan membuka P2 dan menyatakan bahawa 'cloth only, cloth only' tetapi kemudiannya setelah diarah beberapa kali akhirnya telah mengeluarkan anak kunci dari poket kanan hadapan seluar jeans yang sedang dipakainya dan kemudiannya tertuduh sendiri membuka mangga yang mengunci P2. Setelah P2 dibuka, SP5 mendapati di dalamnya terdapat peralatan komputer iaitu 'AC Adapter' dalam kuantiti yang banyak memenuhi ruang dalam P2;

(e) kemudiannya tertuduh dan P2 berserta kandungannya telah dibawa balik ke Balai Polis Changloon. Di Balai Polis Changloon, sekali lagi SP5 telah menjalankan pemeriksaan ke atas P2 dan mendapati bahawa di dalamnya hanya mengandungi *AC Adapter* dalam kuantiti yang banyak yang setiap satunya berbalut dengan plastik lutsinar. Semasa memeriksa *AC Adapter* tersebut, SP5 mendapati bahawa dua *AC Adapter* mempunyai berat yang berbeza. SP5 mendapati *AC Adapter* jenama SONY lebih berat berbanding dengan jenama yang lain. SP5 telah cuba membuka *AC Adapter* tersebut tetapi gagal dan mengarahkan salah seorang anggotanya, Kpl Nordin untuk menghempas *AC Adapter* jenama SONY tersebut ke lantai. Apabila berjaya dipecahkan, SP5 mendapati terdapat satu bungkusan berwarna hitam di dalam *AC Adapter* tersebut. Apabila SP5 memotong sedikit di bahagian atas

bungkusan tersebut, SP5 mendapati di dalam bungkusan tersebut terdapat ketulan putih disyaki syabu; A

(f) SP5 kemudiannya telah mengasingkan kesemua *AC Adapter* yang terdapat di dalam beg tersebut mengikut jenama dan mendapati bahawa terdapat 23 *AC Adapter* jenama SONY, 12 *AC Adapter* jenama TOSHIBA, tujuh *AC Adapter* jenama HP, dua *AC Adapter* jenama ACER dan dua *AC Adapter* jenama SAMSUNG; B

(g) SP5 telah mengarahkan anggotanya mengumpul kesemua *AC Adapter* tersebut dan mendapati kesemua *AC Adapter* yang berjenama SONY termasuk yang mula-mula dipecahkan mengandungi satu bungkusan hitam di dalamnya mengandungi bahan disyaki dadah syabu. Semasa penemuan barang kes ini, SP5 menyatakan bahawa tertuduh dalam keadaan gelisah. Selepas penemuan barang kes ini, SP5 telah mengarahkan tertuduh digari dan barang kes dirampas. SP5 kemudiannya telah membuat laporan polis sabit Changlun Rpt 1329/14 ('P33'). Barang kes dan tangkapan kemudiannya telah diserahkan kepada pegawai penyiasat, Insp Mohd Rizuan Md Salleh ('SP7'); C D

(h) siasatan juga menunjukkan bahawa sebelum tertuduh ditahan oleh SP5, pada jam lebih kurang 1.15 petang hari yang sama iaitu 3 September 2014, En Zainuddin bin Zakaria ('SP1') seorang pemandu teksi nombor WDK 2645 di dalam keterangannya menyatakan bahawa semasa menunggu penumpang di Stesen Teksi Changloon, SP1 telah didatangi seorang perempuan warga Thailand (iaitu tertuduh) untuk menyewa teksi ke Bukit Kayu Hitam dan balik semula ke Changloon (pergi dan balik). Tertuduh telah meminta SP1 membawanya dengan teksi ke restoran KFC yang berada bertentangan dengan Stesen Teksi Changloon untuk mengambil begnya. Beg yang diambil oleh tertuduh di restoran KFC dicamkan oleh saksi SP1 sebagai beg beroda berwarna merah jambu dan hitam ('P2'). SP1 telah memasukkan P2 ke dalam but teksi. Kemudiannya tertuduh telah meminta SP1 membawanya ke Hotel T Changloon yang jaraknya lebih kurang 500 meter daripada restoran KFC tersebut; E F G H

(i) sampai di Hotel T, tertuduh telah meminta SP1 menunggunya di hadapan hotel manakala tertuduh telah masuk ke Hotel T tersebut. Lebih kurang 2–3 minit kemudiannya tertuduh telah keluar semula untuk mengambil P2 dari but teksi dan membawa masuk ke dalam hotel. SP1 menunggu di luar hotel dan selepas 10–15 minit kemudiannya tertuduh telah keluar dari hotel tanpa membawa P2. Tertuduh kemudiannya meminta SP1 membawanya ke Bukit Kayu Hitam; I

(j) sampai di Stesen Teksi Bukit Kayu Hitam, tertuduh telah meminta SP1 menunggunya di situ sementara tertuduh ke Kompleks Imigresen Bukit Kayu Hitam. Lebih kurang lima minit kemudian, tertuduh telah kembali semula kepada SP1 dan minta di hantar semula ke Stesen Teksi Changloon;

(k) sampai di Stesen Teksi Changloon, tertuduh telah meminta SP1 membawanya balik ke Hotel T untuk mengambil begnya yang ditinggalkan di hotel tersebut. Sampai di Hotel T tersebut, tertuduh telah masuk ke dalam hotel dan SP1 menunggu di luar. Dalam masa lebih kurang sepuluh minit kemudiannya, tertuduh kelihatan keluar dari hotel dengan membawa P2. SP1 telah memasukkan P2 ke dalam but teksi. SP1 kemudiannya bergerak dan menurunkan tertuduh dan P2 di Stesen Teksi Changloon;

(l) Puan Rosyadah bt Ibrahim ('SP2') pada 3 September 2014 bekerja sebagai penyambut tetamu di Hotel T, Changloon. SP2 mengesahkan bahawa pada 3 September 2014 semasa bertugas sebagai penyambut tetamu di Hotel T, Changloon. Pada jam lebih kurang 2 petang ada seorang wanita warga Thailand yang kemudian SP2 camkan sebagai tertuduh telah datang dengan sebuah teksi untuk menempah bilik secara bayaran mengikut jam. SP2 menyatakan bahawa tempahan mengikut jam adalah RM50 untuk tempoh selama empat jam. Tertuduh setuju dan telah di daftarkan masuk ke bilik 106 dengan menggunakan pasport Thailand sebagai pengenalan diri. Selepas diberikan *keycard* (kad kunci), tertuduh telah pergi ke bilik dan kemudian keluar semula ke arah teksi yang menunggunya dan mengambil beg bewarna hitam dan merah jambu yang mana telah dicamkan oleh saksi (sebagai P2) dari dalam but teksi dan membawa P2 menuju ke arah biliknya. Kemudian SP2 melihat tertuduh telah keluar semula dari hotel menuju ke teksi yang menunggunya tanpa membawa P2 dan beredar dari hotel. Menurut keterangan SP2, tertuduh kelihatan dalam keadaan tergesa-gesa;

(m) menurut SP2 lagi, lebih kurang 45 minit kemudiannya, tertuduh telah kembali semula ke hotel dan mengambil P2 dan mendaftar keluar dari hotel;

(n) Leong Weng Kit ('SP4') pada masa kejadian bertugas sebagai Penolong Pengurus Hotel Tandop (T Hotel) dan di dalam keterangannya menyatakan bahawa Hotel T dilengkapi dengan CCTV yang beroperasi 24 jam. Rakaman CCTV ini menunjukkan pergerakan tertuduh di hotel tersebut semasa mendaftar masuk dan mendaftar keluar. Dari rakaman CCTV jelas menyokong keterangan SP2. Rakaman CCTV tersebut telah disalinkan oleh pegawai penyiasat SP7 ke dalam pemacu pena (*pendrive*) dan kemudiannya ditayangkan dan ditandakan sebagai P32; dan

(o) berbalik kepada barang kes yang disyaki dadah berbahaya, SP7 telah menghantar barang kes tersebut untuk dianalisa oleh Jabatan Kimia dan ahli kimia kerajaan, Puan Nur Izzati bt Suib ('SP3') telah mengesahkan berat bersih bahan kristal yang terkandung di dalam 23 bungkusan hitam yang di dapati di dalam 23 *AC Adapter* jenama SONY ialah 2266.72g. Hasil analisa oleh SP3 mendapati bahawa bahan tersebut adalah dadah berbahaya iaitu methamphetamine seberat 1723.40g. Methamphetamine adalah seperti yang disenaraikan dalam Jadual Pertama Akta Dadah Berbahaya 1952.

BEBAN PEMBUKTIAN DI PERINGKAT PRIMA FACIE

[4] Seksyen 180(1) dan (2) Kanun Tatacara Jenayah (Revised 1999) (Akta 593) ('KTJ') dengan jelas menyatakan bahawa pihak pendakwaan perlu menunjukkan bahawa terdapatnya suatu kes *prima facie* di akhir kes pendakwaan. Di sini saya perturunkan keseluruhan s 180 KTJ yang dengan nyata diperuntukkan bahawa:

(1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.

(2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[5] Di dalam kes Mahkamah Persekutuan, *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 Augustine Paul HMR di dalam menyampaikan keputusan Mahkamah Persekutuan menyatakan bahawa:

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* (11th Ed) as:
>
> > A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side ...

[6] Di dalam kes Mahkamah Persekutuan juga iaitu kes *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, Gopal Sri Ram HMR dalam menyampaikan keputusan Mahkamah Persekutuan menggariskan prinsip bahawa:

> [5] After the amendments to ss 173(f) and 180 of the CPC, the statutory test has been altered. *What is required of a Subordinate Court and the High Court under the amended sections is to call for the defence when it is satisfied that a prima facie case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence.* It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence.
>
> ...
>
> [8] For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:
>
> (i) *the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;*
>
> (ii) *ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called.* If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;
>
> (iii) *after the defence is called, the accused elects to remain silent, then convict;*
>
> (iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] 1 MLJ 263. (Penekanan ditambah.)

[7] Ini membawa makna bahawa keterangan tersebut hanya boleh diketepikan dengan keterangan menyangkal (*evidence in rebuttal*) (kes *Balachandran v Public Prosecutor*) dan dalam membuat keputusan sama ada pihak pendakwaan berjaya menunjukkan bahawa terdapatnya satu kes prima facie, satu pertimbangan yang maksima (*maximum evaluation*) perlu di buat ke atas segala keterangan yang dikemukakan oleh pihak pendakwaan (kes *Public Prosecutor v Mohd Radzi bin Abu Bakar*).

[8] Pihak pendakwaan perlu membuktikan intipati pertuduhan. Di dalam kes *Public Prosecutor v Puvaneaswaran Kaniapan* [2003] 4 CLJ 609 di mana Augustine Paul H (pada masa itu) menyatakan seperti berikut:

Pihak pendakwaan terlebih dahulu perlu membuktikan bahawa tertuduh mempunyai pemilikan ke atas dadah tersebut sebelum isu pengedaran berkenaan bahan yang sama boleh dibangkitkan untuk pertimbangan. Pembuktian kedua-dua isu ini boleh dibuat menerusi keterangan langsung ataupun melalui anggapan yang diperuntukkan di bawah Akta tersebut. Perlu diingati bahawa anggapan hanya boleh ditimbulkan sekali sahaja kerana anggapan atas anggapan tidak dibenarkan sama sekali (lihat *Muhammed Hassan v PP* [1998] 2 CLJ 170). Dalam usaha membuktikan pemilikan pihak pendakwaan perlu menunjukkan bahawa tertuduh mempunyai jagaan atau kawalan terhadap dadah berbahaya yang berkenaan dan juga dia mempunyai pengetahuan terhadap apa yang ada dalam milikannya. Jagaan dan kawalan boleh dibuktikan melalui keterangan langsung ataupun dibuat kesimpulan daripada fakta yang telah terbukti terdahulunya. Selalunya pengetahuan merupakan perkara yang dapat digarap melalui penyimpulan daripada fakta (lihat *PP v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649). Bagaimana penyimpulan daripada fakta yang telah terbukti dapat dibuat telah saya jelaskan dalam *PP v Reza Mohd Shah Ahmad Shah* [2002] 4 MLJ 13; [2002] 1 LNS 157 MT dan saya tidak mahu mengulanginya di sini. (Penekanan ditambah.)

[9] Lihat juga kes Mahkamah Rayuan *Public Prosecutor v Mhd Dzahir bin Ahmad* [2014] MLJU 1831; [2015] 4 CLJ 880. Oleh itu pihak pendakwaan di dalam kes ini perlu membuktikan bahawa tertuduh mempunyai pemilikan ke atas dadah tersebut. Pemilikan melibatkan elemen jagaan atau kawalan terhadap dadah berbahaya tersebut serta elemen pengetahuan. Pembuktian boleh dibuat melalui keterangan langsung atau melalui anggapan statutori yang terdapat di dalam Akta Dadah Berbahaya 1952. Pendakwaan juga perlu membuktikan sepertimana pertuduhan bahawa barang kes tersebut adalah methamphetamine seberat 1723.40g. Methamphetamine sepertimana disenaraikan di dalam Jadual Pertama Akta Dadah Berbahaya 1952.

KEPUTUSAN DI AKHIR KES PENDAKWAAN SERTA PERTIMBANGAN MAKSIMA KETERANGAN SAKSI PENDAKWAAN

[10] Berdasarkan prinsip kes di atas, saya telah menimbangkan kes pendakwaan atas pertimbangan yang maksima. Isu utama adalah sama ada tertuduh mempunyai jagaan atau kawalan terhadap dadah berbahaya yang berkenaan dan juga sama ada tertuduh mempunyai pengetahuan terhadap apa yang ada di dalam milikannya.

ISU SAMA ADA TERTUDUH MEMPUNYAI JAGAAN ATAU KAWALAN TERHADAP DADAH BERBAHAYA DI DALAM P2

[11] Daripada keterangan saksi-saksi pendakwaan adalah jelas bahawa P2 yang mengandungi dadah berbahaya tersebut berada bersama tertuduh semasa tertuduh ditahan oleh SP5 di Stesen Teksi Changloon. SP5 mendapati bahawa P2 adalah dalam keadaan berkunci. Setelah didesak oleh SP5, tertuduh

mengeluarkan anak kunci dari poket seluar *jeans* yang sedang dipakainya dan membuka mangga yang mengunci P2 yang mana SP5 mendapati kandungannya dipenuhi dengan *AC Adapter*. Keterangan SP1 pula menunjukkan bahawa tertuduh telah meminta SP1 membawanya ke restoran KFC untuk mengambil P2. SP2 juga di dalam keterangannya menyatakan bahawa dia ada melihat tertuduh membawa P2 untuk disimpan di dalam bilik hotel yang tertuduh telah mendaftar masuk dan kemudiannya keluar tanpa membawa P2. 45 minit kemudiannya tertuduh telah kembali semula untuk mengambil P2 serta mendaftar keluar dan menaiki teksi. Teksi tersebut dipandu oleh SP1 dan bergerak ke Stesen Teksi Changloon.

[12] Peguambela tertuduh semasa menyoal-balas SP5 tidak mempertikaikan penemuan *AC Adapter* didalam P2 tetapi mencadangkan bahawa anak kunci P2 bukannya dikeluarkan oleh tertuduh daripada poket seluar yang dipakainya tetapi diambil dari P2 (di mana SP5 nafikan). Adalah jelas sama ada di ambil dari poket seluar atau di ambil dari P2 ia menunjukkan bahawa tertuduh mempunyai pengetahuan tentang kedudukan anak kunci mangga yang digunakan untuk mengunci P2. Daripada keterangan SP5, SP1 dan SP2 serta rakaman CCTV yang dikemukakan di mahkamah adalah jelas bahawa tertuduh mempunyai jagaan atau kawalan terhadap P2 yang mengandungi dadah berbahaya di mana tertuduh dipertuduhkan.

ISU SAMA ADA TERTUDUH MEMPUNYAI PENGETAHUAN BERKENAAN DADAH BERBAHAYA DIDALAM P2

[13] Dalam membuktikan pemilikan, pihak pendakwaan perlu membuktikan bahawa tertuduh mempunyai pengetahuan ke atas dadah yang berada di dalam jagaan atau kawalannya (rujuk antaranya kes-kes *Public Prosecutor v Puvaneaswaran Kaniapan* dan *Public Prosecutor v Mhd Dzahir bin Ahmad*). Di dalam kes Mahkamah Rayuan, *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795; [1997] 4 AMR 3603, Shaikh Daud HMR telah menyatakan bahawa:

> Therefore, it seems clear that without knowledge there cannot be possession. *In most cases knowledge cannot be adduced by direct or tangible evidence but only by inference from the surrounding circumstances.* (Penekanan ditambah.)

[14] Di dalam kes *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585 Lim Beng Choon H telah menyatakan bahawa:

> *I believe it is well settled at least by our courts that to establish possession by an accused person of any dangerous drugs or to impute to him possession of the said drugs it must first be shown that he had knowledge of the drugs which were found to be in his possession.*
>
> ...
>
> Knowledge being an element of the state of mind of a person, the obvious question

is: *how is one to prove the element of knowledge in order to establish possession.* However that may be, certain modes of proof are acceptable as sufficient to distinguish between a genuine and a feigned defence. Those modes of proof are acceptable because unless a defendant confesses that he has the necessary knowledge which is an element of his state of mind such element must be judged from his outward acts or omissions

...

Nevertheless, it is not wrong to say that the accused's state of mind may be gathered from the evidence of what he did or failed to do or what he said on the occasion in question. Putting it shortly, one may say that in order to arrive at a finding of knowledge the court will have to consider the totality of the evidence including any explanations and denials made by the accused and his conduct on the occasion in question. (Penekanan ditambah.)

[15] Mahkamah Persekutuan didalam kes *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 telah menerima keputusan *Badrulsham* ini dan menyatakan seperti berikut:

[13] Now, as to what the ingredients of possession in law has been established by a long line of cases. We find it unnecessary to discuss all of them here. Suffice that we refer to two of them. In *Toh Ah Loh & Mak Thim v Rex* [1949] MLJ 54, Gordon-Smith Ag CJ when delivering judgment of the Singapore Court of Appeal explained the meaning in law of the word 'possession' when appearing in a statute. His Lordship said:

Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of mens rea, without which (except by statute) possession cannot be criminal.

[14] The second is *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158 where Yong J stressed the necessity of establishing the ingredient of knowledge on the part of an accused before he could be incriminated with possession. His Lordship there said:

In my opinion mere possession is one thing and possession with mens rea is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of mens rea. Without mens rea possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

[15] We would also mention the learned judgment of Lim Beng Choon J in *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, which contains a full discussion of the several cases on the point.

A [16] We accept these authorities as correctly stating the law. It follows that where the prosecution seek to prove trafficking by relying on s 37(da), it must to prove at the trial, all the ingredients of possession set out in the cases of *Toh Ah Loh* and *Mak Thim* and *Saad Ibrahim*. (Emphasis added.)

B **[16]** Kes-kes Mahkamah Persekutuan, *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717, *Public Prosecutor v Suzie Adrina bte Ahmad* [2006] 5 MLJ 135 dan *Mr Mamasobri Useng v Public Prosecutor* [2010] 6 MLJ 521; [2011] 6 CLJ 377 adalah juga berkaitan.

C **[17]** Semasa SP5 membuat pemeriksaan ke atas P2 di Stesen Teksi Changloon, SP5 telah mengarahkan tertuduh membuka P2 untuk pemeriksaan. Pada mulanya tertuduh enggan membuka P2 dan memaklumkan kepada SP5 bahawa kandungan P2 hanya mengandungi
D pakaian dengan berkata 'cloth only, cloth only'. Apabila P2 dibuka sememangnya tiada sehelai pakaian pun berada di dalam P2. Ini menunjukkan bahawa tertuduh mengelak daripada P2 dibuka untuk pemeriksaan. SP5 juga di dalam keterangannya menyatakan bahawa tertuduh berada di dalam keadaan gelisah apabila diarahkan berbuat demikian. Daripada kelakuan
E tertuduh ini jelas menunjukkan bahawa tertuduh mempunyai pengetahuan tentang barang salah yang berada di dalam P2. Semasa peguambela tertuduh menyoal balas saksi SP5 juga, SP5 mengesahkan bahawa tertuduh kelihatan gelisah semasa barang kes disyaki syabu dijumpai di dalam *AC Adapter*. Ini juga jelas menunjukkan bahawa tertuduh mempunyai pengetahuan tentang barang
F kes dadah tersebut.

[18] Selain daripada itu, apa keperluannya untuk tertuduh mendaftar masuk ke Hotel T untuk tempoh 45 minit bagi menyimpan P2 sementara tertuduh bergegas ke Bukit Kayu Hitam untuk mengambil telefon bimbitnya yang
G tertinggal di sana. Kenapa beg tersebut tidak dibawa sekali ke Bukit Kayu Hitam jika ia tidak mengandungi barang salah. Keterangan SP1 iaitu pemandu teksi yang membawa tertuduh ke Hotel T dan ke Bukit Kayu Hitam dan kembali semula ke Changloon mengesahkan bahawa selalunya dan pada hari
H itu sememangnya terdapat sekatan jalan raya dan pemeriksaan oleh Unit Pencegah Penyeludupan ('UPP') hala balik dari Bukit Kayu Hitam ke Changloon. Oleh itu perbuatan tertuduh yang sanggup membayar RM50 untuk menyewa bilik selama empat jam (tetapi sebenarnya menggunakannya untuk menyimpan P2 selama 45 minit) jelas menunjukkan bahawa tertuduh
I mempunyai pengetahuan tentang kandungan di dalam ('P2') dan tidak mahu mengambi risiko dengan membawa P2. Oleh itu tertuduh mempunyai pengetahuan berkaitan barang kes dadah tersebut yang terkandung di dalam P2.

[19] Berdasarkan keterangan saksi-saksi pendakwaan, mahkamah mendapati bahawa tertuduh mempunyai pemilikan terhadap barang kes dadah yang dijumpai di dalam 23 *AC Adapter* jenama SONY yang di dapati di dalam P2 tersebut.

ELEMEN PENGEDARAN DADAH BERBAHAYA IAITU METHAMPHETAMINE SEBERAT 1723.40G

[20] Ahli Kimia Kerajaan Pn Nur Izzati bt Suib ('SP3') telah mengesahkan bahawa barang kes yang disyaki dadah yang terdapat di dalam 23 *AC Adapter* jenama SONY tersebut adalah methamphetamine seberat 1723.40g dan methamphetamine adalah tersenarai dalam Jadual Pertama Akta Dadah Berbahaya 1952. Berdasarkan berat methamphetamine yang terlibat, ia membangkitkan anggapan statutori di bawah s 37(da) Akta Dadah Berbahaya 1952 bagi membuktikan inti pati perbuatan mengedar dadah berbahaya tersebut.

[21] Peguambela tertuduh di dalam hujahnya membangkitkan juga isu bahawa:

(a) terdapatnya pemutusan rantaian keterangan mengenai ekshibit dadah yang dirampas; dan

(b) keduanya, terdapat percanggahan berkaitan berat dadah.

[22] Berkaitan pemutusan rantaian keterangan barang kes dadah yang dirampas, peguambela tertuduh telah merujuk kepada P35 iaitu borang serah menyerah barang kes antara SP5 dan SP7. Peguambela menghujahkan bahawa barang kes yang diserah oleh SP5 dan diterima oleh SP7 adalah dicatitkan seperti berikut:

(a) M1–M23;

(b) M1A–M23A; dan

(c) M1AA–M23AA.

Tetapi tandaan tersebut tidak dinyatakan di dalam laporan kimia ('P8'). Peguambela merujuk kepada gambar P36 di mana beliau menghujahkan bahawa penandaan R1–R22, R1A–R22A dan R23A, R1AA hingga R22AA dan R23AA tidak dilihat di atas barang kes seperti di dalam gambar P36E, F dan G.

[23] Untuk memahami rantaian keterangan berkaitan barang kes, perlulah diteliti keterangan saksi-saksi terutama SP5, SP7 dan SP3. SP5 di dalam keterangannya telah menyatakan bahawa barang kes yang beliau rampas telah

dibuat penandaan oleh beliau sendiri dengan meletakkan tanda 'M' untuk beg P2 dan seterusnya untuk barang kes lain seperti terdapat dalam borang serah menyerah barang kes dengan SP7 iaitu P35. Penandaan beliau adalah M1–M23 untuk 23 plastik lutsinar yang membaluti setiap satu *AC Adapter* jenama SONY. M1A hingga M23A untuk 23 *AC Adapter* jenama SONY tersebut dan seterusnya tandaan M1AA hingga M23AA untuk 23 bungkus plastik hitam yang mengandungi bahan disyaki dadah berbahaya tersebut yang terdapat di dalam setiap AC Adapter jenama SONY tersebut.

[24] SP7 iaitu pegawai penyiasat pula semasa menerima barang kes tersebut telah membuat penandaan kedua ke atas barang kes dengan meletakkan tanda 'R' untuk beg P2 seterusnya R1–R23, R1A–R23A dan R1AA–R23AA dengan rujukan silang kepada penandaan yang dibuat oleh SP5. Ahli kimia kerajaan SP3 pula di dalam laporan kimia beliau merujuk kepada penandaan yang dibuat oleh pegawai penyiasat SP7. Malah jika diteliti keterangan lisan SP3, beliau ada menyebut kesemua tandaan yang terdapat di atas barang kes termasuk penandaan yang dibuat oleh SP5 oleh itu pada hemat mahkamah ini tidak terdapat pemutusan ke atas rantaian keterangan berkaitan barang kes. Dalam konteks ini mahkamah ingin merujuk kepada kes Mahkamah Rayuan, *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551, di mana Abdul Hamid Mohamad HMR menyatakan bahawa:

> First, by way of a general observation, I am of the view that, *in a drug trafficking case what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis etc. and it is in respect of that substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist.* Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that same substance that the accused is charged with.
>
> The proof of the chain of evidence is only a method of proving that fact. The fact that there is 'a gap', does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. *There may be a gap in the chain of evidence. But, if for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tampering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact.*
>
> The second period is from the time that it was received back from the chemist until it is produced in court. In my view, the chain of evidence is less important during

this second period. This is because, as far as I am aware, there is no law that the exhibit recovered must be produced in court and if not the prosecution's case must necessarily fall. (Penekanan ditambah.)

Oleh itu saya mendapati bahawa tiada pemutusan di dalam rantaian keterangan berkaitan barang kes dadah sepertimana yang dibangkitkan peguambela tertuduh.

[25] Berkaitan isu percanggahan berat dadah, peguambela merujuk kepada keterangan SP5 melalui laporan polisnya iaitu Changlun Rpt 1329/14 ('P33') yang menyatakan berat dadah yang dirampas adalah 2.420kg manakala ahli kimia SP3 pula di dalam laporan kimia ('P8') mencatitkan berat dadah adalah 2266.72g iaitu perbezaan 200g. Daripada keterangan SP3 adalah jelas bahawa SP3 menimbang bahan kristal dan mendapati berat bersih adalah 2262.72g dengan menggunakan alat penimbang yang telah dikalibrasi. Pun begitu aspek penandaan barang kes dari rampasan hinggalah sampai kepada SP3 untuk dibuat ujian tiada pemutusan rangkaian keterangannya. Oleh itu hujah peguambela tertuduh tentang percanggahan ini tiada merit. Mahkamah dengan ini mendapati bahawa terdapat kes prima facie terhadap tertuduh di akhir kes pendakwaan dan memanggil tertuduh untuk membela diri.

KES PEMBELAAN

[26] Tertuduh telah memilih untuk memberi keterangan bersumpah. Secara ringkasnya, di dalam keterangan bersumpahnya, tertuduh menyatakan seperti berikut:

(a) tertuduh bekerja sebagai tukang urut dan pelacur di sebuah kelab malam di Bangkok dan pernah keluar masuk ke Malaysia sebanyak 6–7 kali;

(b) pada 1 September 2014, seorang kawan sekerjanya yang bernama Pho telah menghubungi tertuduh melalui telefon dan memaklumkan bahawa ada seorang pelanggan ingin melanggan tertuduh dan Pho juga ingin mengirim sebuah beg kepada pelanggan tersebut;

(c) tertuduh telah ke kondominium di mana Pho dan teman lelaki Pho tinggal untuk mengambil beg yang ingin dikirimkan tersebut. Di sana tertuduh tidak berjumpa dengan Pho tetapi telah berjumpa dengan teman lelaki Pho yang dikatakan oleh tertuduh sebagai seorang lelaki negro;

(d) apabila tertuduh mendapati beg tersebut adalah besar dan berat, tertuduh telah meminta upah sebanyak Baht1,300 untuk membawa beg tersebut;

(e) tertuduh semasa menerima beg tersebut ada melihat kandungannya dan

mendapati ia berisi kabel internet, *headphone* dan *webcam;*

(f) pada 2 September 2014, tertuduh telah bertolak dari Bangkok ke Hatyai dengan menaiki bas. Dari Hatyai ke Danok, tertuduh telah menaiki teksi. Semasa di Danok, tertuduh telah membeli sebuah beg baru iaitu seperti di dalam gambar P36A kerana beg asal susah dibawa. Tertuduh menyatakan bahawa semua kandungan beg asal beserta beg asal itu sendiri telah dimasukkan ke dalam beg yang baru dibeli;

(g) tertuduh di dalam keterangannya juga menyatakan bahawa memandangkan barang di dalam beg asal banyak dan semasa tertuduh zip beg baru tersebut zip telah rosak, tertuduh telah membeli dan memasang mangga (*padlock*) pada beg tersebut dan anak kunci di simpan di bahagian tepi beg tersebut;

(h) dari Danok, tertuduh telah masuk ke Malaysia dengan menaiki sebuah teksi. Semasa melalui pemeriksaan kastam hanya tertuduh yang turun untuk cop pasport manakala beg tersebut berada di dalam but teksi;

(i) sampai di Changloon, tertuduh telah ke Stesen Bas Changloon untuk membeli tiket bas ke Kuala Lumpur. Kemudiannya tertuduh telah ke restoran KFC yang berada bertentangan dengan Stesen Bas Changloon tadi. Semasa di dalam restoran KFC, tertuduh menyedari bahawa telefon bimbitnya tiada. Tertuduh telah meninggalkan begnya di situ dan telah pergi semula ke kaunter tiket bas tadi dan mencari telefon bimbitnya di situ tetapi tiada;

(j) tertuduh selepas itu telah meminjam telefon dan menelefon ke telefonnya dan mendapati bahawa telefonnya di jawab seseorang dan dimaklumkan bahawa telefonnya tertinggal di dalam teksi yang tertuduh naiki tadi dari Danok ke Changloon;

(k) selepas itu tertuduh telah menyewa sebuah teksi daripada Changloon untuk ke Danok dengan tujuan mengambil semula telefon bimbitnya. Tetapi sebelum itu tertuduh dengan menaiki teksi yang sama telah ke restoran KFC untuk mengambil begnya dan kemudian ke Hotel T untuk menyimpan beg kerana merasakan tidak perlu membawa beg tersebut. Setelah ke Bukit Kayu Hitam dan mendapatkan semula telefon bimbitnya, tertuduh telah balik semula ke hotel untuk mengambil beg tersebut sebelum bergegas semula ke Stesen Bas Changloon;

(l) semasa di Stesen Bas Changloon, tertuduh telah ditahan oleh polis dan di bawa balik ke Balai Polis Changloon. Di Balai Polis Changloon polis telah membuat pemeriksaan dan menjumpai dadah di dalam sebahagian daripada *AC Adapter* yang terdapat di dalam beg yang dibawa tertuduh; dan

(m) tertuduh menafikan pengetahuan tentang dadah yang dijumpai di

dalam *AC Adapter* tersebut dan menyatakan bahawa dia telah dianiayai oleh Pho. A

[27] Sebelum saya mempertimbangkan kes pembelaan, eloklah dinyatakan apakah pendekatan yang perlu diambil oleh mahkamah. Di dalam kes *Public Prosecutor v Mohd Radzi Abu Bakar* tadi telah dinyatakan bahawa: B

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] 1 MLJ 263. C

[28] Di dalam kes *Mat v Public Prosecutor* [1963] 1 MLJ 263, di mana Suffian J (pada masa itu) menggariskan prinsip bahawa: D

The position may be conveniently stated as follows:

(a) If you are satisfied beyond reasonable doubt as to the accused's guilt ... Convict.

(b) If you accept or believe the accused's explanation ... Acquit. E

(c) If you do not accept or believe the accused's explanation ... Do not convict but consider the next steps below.

(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt ... Convict F

(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt ... Acquit

[29] Apakah makna keraguan yang munasabah. Di dalam kes *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 Sharma J telah menyatakan seperti berikut: G

The following definition of — 'reasonable doubt' is often quoted:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. H

It has again been said that 'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there'. I

A Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

B **[30]** Ini membawa makna bahawa tertuduh hanya perlu menimbulkan keraguan yang munasabah ke atas kes pendakwaan dan mengemukakan keterangan di atas beban imbangan kebarangkalian untuk mematahkan anggapan pengedaran di bawah s 37(da) Akta Dadah Berbahaya 1952. Ini jelas diputuskan di dalam kes Mahkamah Agong, *Mohamad Radhi bin Yaakob v* C *Public Prosecutor* [1991] 3 MLJ 169 di mana Mohamed Azmi HMA menyatakan bahawa:

D It is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. *In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof* E *as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.* (Penekanan ditambah.)

F **[31]** Di dalam keterangan tertuduh, tertuduh menafikan mempunyai pengetahuan mengenai dadah yang dijumpai di dalam *AC Adapter* jenama SONY tersebut di dalam beg P2. Peguambela juga menghujahkan bahawa *adapter* yang dirampas tersebut kelihatan biasa dan tidak pelik dan sukar untuk sesiapapun mengesyaki bahawa terdapatnya dadah di dalam *AC Adapter* G tersebut. Merujuk kepada keterangan SP5 di peringkat pendakwaan, semasa SP5 ingin membuat pemeriksaan kandungan beg P2 di Stesen Bas Changloon, tertuduh tidak memberikan kerjasama dan menyatakan bahawa kandungan P2 adalah 'cloth only, cloth only'. Fakta ini tidak di pertikaikan oleh peguambela kerana tidak di soalbalas oleh peguambela tertuduh dan seharusnya keterangan H saksi berkaitan fakta ini diterima (rujuk kes *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212, *Public Prosecutor v Mohd Amin bin Mohd Razali & Ors* [2002] 5 MLJ 406; [2002] 5 CLJ 281). Walau bagaimanapun tertuduh di dalam pembelaannya sebenarnya mengetahui bahawa tiada apa-apa pakaian di dalam beg P2 tersebut kerana di dalam keterangannya, tertuduh menyatakan I bahawa di Danok, tertuduh telah membeli sebuah beg baru iaitu seperti di dalam gambar P36A kerana beg asal susah dibawa. Tertuduh menyatakan bahawa kesemua kandungan beg asal berserta beg asal itu sendiri telah dipindahkan masuk ke dalam beg yang baru dibeli. Ini membawa makna bahawa tertuduh sendiri yang memasukkan *AC Adapter* ke dalam beg P2 dan

mengetahui bahawa tiada sehelai pakaian pun di dalam P2 tetapi apabila SP5 ingin menjalankan pemeriksaan telah memberitahu SP5 bahawa di dalam P2 hanya ada pakaian yang sememangnya dia ketahui tiada pakaian di dalam P2. Ini jelas menunjukkan bahawa tertuduh mengetahui dadah berbahaya berada di dalam beg P2.

[32] Peguambela mempertikaikan mengapa tiada rampasan ke atas alat-alat komputer yang lain sepertimana yang dinyatakan oleh tertuduh di dalam keterangannya iaitu *webcam* dan *headphone* serta kabel internet serta beg asal. Perkara ini tidak ditanya kepada saksi pendakwaan SP5 yang membuat rampasan dan hanya timbul semasa tertuduh memberi keterangan. SP4 dan SP7 hanya mengesahkan bahawa 24 *AC Adapter* jenama Sony, 12 *Adapter* Toshiba, tujuh *Adapter* HP, dua *Adapter* Acer dan dua *Adapter* Samsung yang berada di dalam P2. Oleh itu saya mendapati ia hanya rekaan tertuduh dan pemikiran terkemudian oleh tertuduh. Di dalam kes Mahkamah Persekutuan, *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149, Ahmad Maarop HMP menyatakan bahawa:

> [45] On the part of the learned trial judge although Siew's statement from the dock was not evidence given under oath, she evaluated the statement as if it were given as evidence under oath (see para 81 of her judgment). We have set out Siew's statement. Siew admitted that he rented the first house, but claimed that it was for his friend, Wah Chai. Siew said he had never stayed in the first house. He said he and his wife stayed in the second house. They went to the first house only when Wah Chai was there. Siew denied knowledge of the proscribed drugs and said all the things in first house belonged to Wah Chai. However, Siew admitted that he knew the combination number of the safe. Now, Wah Chai was the central figure and the most important character whose purported existence and role served as the supporting pillar of Siew's defence. Yet, the existence and role of Wah Chai were never put during the prosecution's case. Wah Chai surfaced suddenly at the defence stage. Regarding this the learned trial judge said:
>
> > I am aware that there is no onus on the defence to call any witness and thus no adverse inference can be drawn against the accused for the failure to call Wah Chai as witness in his behalf. However, the fact remains that the existence of Wah Chai was never even suggested during the case for the prosecution.
> >
> > In view of the fact that this was a retrial and 10 years had gone by since the date of his arrest, one would have thought that if Wah Chai existed, his name and his existence would have been uppermost in the mind of the accused and would have been raised when SP9, or even SP10 and SP6, were cross-examined.
> >
> > The fact that 'Wah Chai' was only mentioned at the defence stage raised serious doubts as to the existence of that character.
>
> We do not think the learned trial judge could be faulted for that. In *Alcontara Ambross Anthony v Public Prosecutor*, the Federal Court said:
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> > In a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or

deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention in other words, 'kept up its sleeve', as it were — and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

[46] *Although failure on the part of the defence to put its case to the material prosecution's witness, can never by itself relieve the prosecution of its duty to prove the charge against the accused beyond reasonable doubt (Alcontara Ambross Anthony v PP), such failure by the defence did have serious implication on the accused's credibility and the weight to be attached to his evidence. The necessity of putting the essence of his case to the material prosecution's witness is not a mere technical rule of evidence. It is a rule of essential justice.* In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at pp 193–194, Augustine Paul J (as he then was) said:

> *The nature of the defence is to be ascertained not only from the evidence of the accused himself but also from the trend of the cross-examination of the prosecution witnesses and from the arguments of the accused's counsel at the close of the trial (see Kuli E Ors v Emperor AIR 1930 Call 442). It is therefore important for the accused to put his essential and material case to the prosecution witnesses in cross-examination. This is a principle of essential justice* and was neatly stated by Mukhrji J in *AEG Carapiet v AY Derderian AIR* 1961 Cal 359 in the following terms:
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> > The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated. (Penekanan ditambah.)

[33] Tertuduh di dalam keterangannya juga menyatakan bahawa dia telah dianiaya oleh kawannya yang bernama Pho yang memintanya menyerahkan *AC Adapter* tersebut kepada seseorang di Kuala Lumpur. Berdasarkan

keterangan daripada tertuduh sendiri, tertuduh menyatakan bahawa dia telah mengenali Pho lebih kurang 2–3 tahun sebelum tertuduh ditangkap. Pho melakukan kerja yang sama dengan tertuduh iaitu sebagai pelacur dan tukang urut. Enam bulan sebelum kejadian ini, tertuduh dan Pho telah berselisih faham kerana berebut teman lelaki dan selepas itu terputus hubungan dan tidak berjumpa antara satu sama lain hinggalah Pho menelefon tertuduh pada 1 September 2014 dan menawarkan pelanggan dan untuk membawa satu beg ke Kuala Lumpur. Sekiranya benar bahawa tertuduh dan Pho telah tidak bertegur sapa selama enam bulan, adalah agak menghairankan bahawa selepas enam bulan itu, dengan hanya satu panggilan telefon, tertuduh telah bersetuju untuk memenuhi permintaan Pho. Tambahan pula mengikut tertuduh, dia meminta upah sebanyak Baht1,300 untuk membawa beg tersebut tetapi menghabiskan sejumlah wang untuk membeli beg yang baru di Danok dan membayar harga RM50 untuk menyewa bilik di Hotel T, Changloon untuk menyimpan P2. Dalam hal ini saya merujuk kepada kes Mahkamah Rayuan, *Khairiddin Sufi v Public Prosecutor* [2012] 6 CLJ 457 di mana Abdul Wahab Patail HMR menyatakan bahawa:

> [10] That a defence is 'a recent invention' essentially means not only it is not true, but it is also not fact and certainly not evidence to be taken into consideration. Other references to such defences may be found in *Megat Halim Megat Omar v PP* [2009] 1 CLJ 15; [2008] 1 LNS 547; *AEG Carapiet v AY Derderian AIR* 1961 Cal 359. In the latter case, it was said:
>
> > It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examination that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share.
>
> [11] In *Tan Kim Ho & Anor v PP* [2009] 3 CLJ 236; [2009] 1 LNS 173, the Federal Court held at para 36 of its judgment that:
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> > This is however not to say that there is any burden placed on the accused to disprove any guilt or to prove innocence. It is only assessing the credibility of a witness, in this case the second appellant's credibility. In order to determine whether an accused was telling the truth, one of the considerations is whether he had indicated his defence during the prosecution's case.
>
> *We observe that the case law as to 'defence being an afterthought' is usually in reference to not putting the defence to the relevant prosecution's witnesses at trial.* Perusing the cross-examination of SP3, SP5 and SP6, we found that nowhere was it suggested that the appellant had informed SP3, SP5 or SP6 that the bag was not his and that he did not know the nature of the contents. And SP5 and SP6 had replied that at all times, in this case, they had not been told of the existence of Mukhlis by anyone.

That reply was not contradicted by the cross-examiner.

[12] We turn to consider whether rejection as an afterthought applies also to not raising a defence at the earliest occasion arising after arrest but before trial.

[13] It has been said that where the law gives a person the right to be silent, it is wrong for the court to infer that his silence is incriminating: *PP v Tan Ah Khong & Anor* [1988] 1 CLJ 835; [1988] 2 CLJ Rep 329. The law gives the right to remain silent as a right against self incrimination. The afterthought occurring in defences are always in nature and intent, exculpatory statements. Being exculpatory rather than incriminating, we find no reason why, if the appellant was a purely innocent carrier and did not know the nature of the contents of the bag, he should not have said so at the earliest occasion for an explanation arises, and if he does not do so, no reasonable doubt can arise on that defence when made later. We find support for this reasoning in the decision of the Federal Court in *Ahmad Najib Aris v PP* [2009] 2 CLJ 800 where Zulkefli Makinudin FCJ reasoned, in respect to the right to remain silent when an accused is called to enter upon his defence that:

> [48] With respect ..., I am of the view that when the appellant chooses to remain silent, the court is put in a situation where it has no other choice but to convict the appellant on both charges as the appellant had failed to rebut the evidence adduced by prosecution's witnesses ...
>
> ...
>
> [50] It is my view that an accused's right to remain silent is not at all infringed by the principle of 'if unrebutted would warrant a conviction'. It means what it says. The evidence adduced must be such that it must warrant a conviction if it is unrebutted. Therefore, the appellant's failure to call other witnesses to rebut the prosecution's case leaves the court with no other alternative but to convict him.

[14] *We reason similarly that if an accused makes no effort to exculpate himself when the occasion to do so arises, then on the assessment of his defence raised belatedly as to whether it raises a reasonable doubt, he runs the risk that it may be held to be an afterthought, and it being exculpatory is not a denial of the right to remain silent. We hold that an exculpatory statement, which could have been made earlier but was not, when disclosed belatedly without giving reason therefor, may be dismissed as an afterthought.*

[15] The obvious occasion to say the bag was not his and that he did not know the nature of the contents of it arose at the time of his arrest or at the latest when the contents of the bag were brought out of the bag in front of him. Not later, and certainly not when it only emerges at the trial. If raised only at the prosecution stage of the case, that is of little weight, unless it is conceded by the prosecution, because raising it at the eleventh hour makes it an assertion for which no opportunity was given to verify its truth or correctness. This applies particularly to the assertion in the defence that there is that other person whose name is Mukhlis. Without any explanation as to why such exculpatory statement was not made earlier, it is an afterthought. An afterthought does not constitute fact, let alone evidence of its content. There is nothing, therefore, for the court to consider. Having put the suggestions to the prosecution witnesses, without more, cannot and therefore does not elevate such exculpatory assertions in the testimony of the accused, sworn on oath or otherwise, to evidence to be considered. (Penekanan ditambah.)

Saya mendapati bahawa keterangan tertuduh sukar diterima dan hanyalah rekaan semata-mata serta penafian dan pemikiran terkemudian oleh tertuduh. A

[34] Persoalan seterusnya adalah sama ada tertuduh telah berjaya menyangkal anggapan di bawah s 37(da) ADB 1952. Di dalam kes Mahkamah Rayuan, *Nasruddin bin Daud v Public Prosecutor* [2010] 3 MLJ 329; [2010] 2 CLJ 322, Heliliah Mohd Yusof HMR memutuskan bahawa: B

> [27] The other aspect to be dwelt upon with regard to the case of the defence is the discussion in *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 at pp 91–92, where the material parts of the statement of Lord Diplock are: C
>
> > This appeal turns solely upon the construction of these words 'unless the contrary is proved'.
> >
> > ...
> >
> > The Evidence Ordinance applies to civil and to criminal proceedings alike and the definitions of 'proved' and 'disproved' draw no explicit distinction between facts required to be proved by the prosecution in criminal proceedings and facts required to be proved by a successful party to civil proceedings. Yet it cannot be supposed that the Evidence Ordinance intended by a provision contained in what purports to be a mere definition section to abolish the historic distinction fundamental to the administration of justice under the common law, between the burden which lies upon the prosecution in criminal proceedings to prove the facts which constitute an offence beyond all reasonable doubt and the burden which lies upon a party in a civil suit to prove the facts which constitute his cause of action or defence upon a balance of probabilities. D E
> >
> > The degree of probability of the existence or non-existence of a fact which is required in order for it to be 'proved' or 'disproved' within the meaning ascribed to those words in the Evidence Ordinance, in Their Lordships' view, depends upon the nature of the proceedings and what will be the consequence in those proceedings of a finding that a fact is 'proved' or 'disproved'. If that consequence will be the determination of a civil suit in favour of one party a balance of probabilities is all that is necessary. It is sufficient that upon the evidence the court considers that it is more likely than not that the fact exists or does not exist. This has been the rule at common law since at least the sixteenth century. See *Newis v Lark* cited by Willes J in *Cooper v Slade*. In criminal proceedings on the other hand, by an exception to the general rule founded upon considerations of public policy, if the consequence of a finding that a particular fact is proved will be the conviction of the defendant the degree of probability must be so high as to exclude any reasonable doubt that that fact exists. F G H
> >
> > Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are 'not proved'. But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist 'unless the contrary is proved'. In such a case the I

consequence of finding that that particular fact is 'disproved' will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact's being 'disproved' there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In Their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities. This was the test which was approved by the Court of Criminal Appeal in *R v Carr-Briant* a case upon a provision in an English statute in similar terms to that contained in s 14 of the Malaysian Prevention of Corruption Act 1961. For the reasons already indicated Their Lordships do not think that, at any rate where such a provision is contained in an enactment, the definitions of 'proved' and 'disproved' contained in the Evidence Ordinance make any difference between Malaysian law and English law in this respect.

[28] In the circumstances of this case the finding of the trial judge is that he has accepted the version of the prosecution and the version attempted to be raised by the accused as not, on a balance of probabilities, being proved to rebut the presumption being invoked. In addition we do not find the trial judge in error by referring to the large quantities of drugs found in his possession. The trial judge has properly considered the matter that the possession of such large quantities could negate the possibility that the drugs were in his possession for his own purpose or even to suggest that he is in possession of it as a drug addict. It cannot therefore be said that the trial judge did not consider another aspect that could be of some assistance to rebut the presumption.

[35] Berdasarkan otoriti di atas dan kes-kes duluan, beban adalah kepada tertuduh untuk menyangkal anggapan di bawah s 37(da) Akta Dadah Berbahaya 1952 atas imbangan kebarangkalian. Berdasarkan keterangan daripada tertuduh secara keseluruhannya sepertimana saya kupas di atas, saya mendapati bahawa tertuduh telah gagal untuk menangkis anggapan di bawah s 37(da) Akta Dadah Berbahaya 1952. Saya juga mendapati bahawa tertuduh tidak menimbulkan apa-apa keraguan yang munasabah terhadap keterangan di dalam kes pendakwaan.

KESIMPULAN

[36] Saya mendapati bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan yang munasabah dan oleh itu tertuduh didapati salah dan disabitkan atas pertuduhan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Memandangkan hanya terdapat satu hukuman sahaja bagi kesalahan ini, saya dengan ini menjatuhkan hukuman gantung dileher sampai mati terhadap tertuduh di bawah s 39B(2) Akta yang sama.

Tertuduh disabitkan bersalah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952.

Reported by Kanesh Sundrum